102

(1)

No. 08-127

FILED

AUG 2 8 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RONALD JOHNSON,

Petitioner,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; TRIVESCO, a partnership; and its Partners; ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; STEINER AND KOPPELMAN, INC., a corporation; and HIGHLAND VILLA BUILDERS, INC., a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION OF CITY OF SHOREWOOD TO THE PETITION FOR WRIT OF CERTIORARI

GEORGE C. HOFF
HOFF, BARRY & KOZAR, P.A.
160 Flagship Corporate Center
775 Prairie Center Drive
Eden Prairie, MN 55344-7319
(952) 941-9220

Attorney for Respondent City of Shorewood

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

1. Misstatements of Fact 2

2. Misstatements of Law 5

ARGUMENT 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8

San Remo Hotel, LP v. City and County of San Francisco, 545 U.S. 323 (2005) 5, 7, 9

Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984) 8

Vern Reynolds Constr. Inc. v. City of Champlin, 539 N.W.2d 614 (Minn. Ct. App.1985) 8

Williamson County Reg'l Planning Comm. v. Hammilton Bank, 473 U.S. 172 (1985) 7

STATUTES:

28 U.S.C. § 1738 9

42 U.S.C. § 1983 7

For its Brief in Opposition to the Petition for Writ of Certiorari of Petitioner Ronald Johnson, Respondent City of Shorewood, Minnesota ("Shorewood") submits the following:

STATEMENT OF THE CASE

Petitioner began his long, litigious history with Shorewood and various other defendants in 1991. Following that case, Petitioner was paid compensation following inverse-condemnation proceedings which resulted in a judgment for repayment of clean-up costs, plus interest, and attorneys fees and costs. While Shorewood appealed the decision, Petitioner did not. After it was finalized, and the judgment paid in full, Petitioner began serial re-litigation of the same issues, claiming he received zero compensation and alleging new theories of liability arising from the same basic allegations. These various lawsuits, in both federal and state venues, have all been dismissed – culminating in a comprehensive recitation of the history of the case by the Minnesota Court of Appeals, concluding, again, with dismissal. *See* App. 1-41. The Minnesota Supreme Court then declined review. App. 74-75.

Petitioner claims essentially that he has been left without a remedy for his takings claims. He suggests that he could not litigate federal claims earlier because they were unripe, and cannot litigate them now because he is barred by *res judicata*. In

reality, Petitioner has already been compensated for any taking and the matter is resolved. As noted, Petitioner did not appeal the verdict. His evident present unhappiness with that result notwithstanding, he cannot re-litigate a claim that has already been decided in a trial on the merits and not appealed. No precedent, from this Court or elsewhere, suggests any other result, regardless of how Petitioner chooses to frame his claims or the venue in which he may attempt to raise them. Respectfully, this Court should deny the Petition for Writ of Certiorari.

1. Misstatements of Fact.

U.S. Supreme Court Rule 15 admonishes counsel that "they have an obligation to the Court to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition" (emphasis added). Pursuant to that clear directive, Shorewood briefly identifies the following misstatements contained in the petition:

- At page 2, Petitioner suggests that Shorewood built a "culvert/dam that flooded a decades-long dry ditched-and-drained land mass – used as farmland." As Petitioner knows, and eventually states, what the City built was a road berm, culvert, and pond-control structure south of the subject property. *See* App. 5.

- Also at page 2 (and at numerous times throughout the petition), Petitioner submits

that he received "zero compensation" for a previous taking. In fact, Petitioner was paid in full on a judgment of $63,000, plus interest, for clean up costs as a result of flooding on the property in addition to attorneys fees. The lower courts have repeatedly dealt with this assertion, explaining that while Shorewood challenged the decision, Petitioner did not. It is final and binding on the parties.

- At page 4, Petitioner asserts that "Shorewood had promised to negate subsequent flooding events through mitigation projects." The voluminous record in this matter and the many related cases contain no evidence of any such promise.

- At page 8, Petitioner alludes to discussions about mitigation projects in 1997 and 1998 between Petitioner and Shorewood. No evidence of any such discussions exists.

- At page 10, Petitioner again asserts that he has received zero compensation for governmental flooding of his property. The Minnesota Court of Appeals explained that the $63,000, plus interest, that Petitioner received was, in fact, full compensation for his loss. *See* App. 11-12.

- Again at page 10, Petitioner claims that Shorewood misrepresented an Army Corps of Engineers' determination regarding the status of the property. Petitioner's contention is simply false. The comprehensive opinion of the Minnesota Court of Appeals addresses – and disposes of – this allegation at some

length. *See* App. 24-29. In short, as opposed to the fraud on the court that Petitioner claims occurred, the jury was presented a "battle of experts" on the issue of the status of the property and reached a decision. No misrepresentation occurred.

- At page 11, Petitioner asserts that his "property unequivocally had ditched-and-drained 'dry' since the 1950's." However, in the process of informing Petitioner that a site visit would be necessary to determine for certain whether his property contained wetlands, the Army Corps of Engineers informed Petitioner that his property had wetland characteristics (including hydrology, soils, and vegetation) and that portions of the property appeared on Wetland Inventory maps, indicating that its character was something other than "dry." *See* App. 26-27.

- With the citation at n. 6, Petitioner implies that Shorewood changed positions regarding the location of wetlands on the property. Shorewood has consistently relied on the Army Corps of Engineers to determine whether the property contains wetlands and to what extent. No change of position has occurred.

- At pages 12-14, Petitioner asserts the presence of "extrinsic fraud" in the 1996 trial in this matter. As noted herein, the Minnesota Court of Appeals dealt with that allegation in its comprehensive opinion in this matter. App. 24-29. Petitioner submitted

expert testimony. Shorewood and its expert witness formed an opinion relying on the available data from the Army Corps of Engineers. That available data did not and does not contain information gleaned from a site visit of the property because Petitioner has not, to date, permitted such a site visit to occur.

- At page 15, Petitioner grossly overstates the extent of the "governmental occupation" of his property by construction equipment, a silt fence, and a walking trail. As the Minnesota Court of Appeals noted, construction equipment remained on the property for "less than one day" and the proposed walking trail on the property was never graded, constructed, or opened to the public. A silt fence was on the property for less than a week. App. 6, 36.

2. Misstatements of Law.

In addition to the above, which primarily are misstatements of fact, the petition also is riddled with misstatements and mischaracterizations of legal authority. While Shorewood would likely be forced to exceed the limitations set by Rule 33 in order to point out and explain all of the inaccuracies Petitioner submits for consideration, major misstatements of law in the petition include the following:

- At page 17, Petitioner, in the process of asking this Court to reconsider its scarcely three-year-old *San Remo Hotel, LP v. City*

and County of San Francisco, 545 U.S. 323 (2005), decision, suggests an incorrect test, i.e., denial of "*any* compensation," for the ripeness of a federal takings claim. As the Court well knows, the actual threshold is whether there has been a denial of "*just* compensation" for a taking. Moreover, the Supreme Court has already held that "just compensation" may be zero where circumstances dictate that result. *See, e.g., Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003) (noting that "just compensation" is measured by the owners' pecuniary loss *and may be zero* in some cases).

• At pages 17-18, Petitioner truncates a quote from the syllabus of the *San Remo Hotel* decision, rendering its meaning, at best, unclear. Petitioner suggests that *San Remo Hotel*, 545 U.S. at 325, "clearly mandates that the state court shall hear 'simultaneously [Johnson's] request for compensation under state law and [Johnson's] claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.'" What that quote leaves out is the following important context:

> *With respect to those federal claims that did require ripening, petitioners are incorrect that* ***Williamson County*** *precludes state courts from hearing* simultaneously a plaintiff's request for compensation under state law together with a claim that, in the alternative, the denial

> of compensation would violate the Fifth Amendment of the Federal Constitution.

Contrary to Petitioner's implication, no "mandate" is mentioned or contemplated. What *San Remo Hotel* and *Williamson County* explicitly hold is that, where state and federal law on takings are coextensive and the state court process resolves a takings claim, a second bite at the federal takings apple in federal court is not required.

• At pages 20-21, Petitioner mischaracterizes the mechanics of the ripeness requirement for takings claim under 42 U.S.C. § 1983. Petitioner suggests that *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985) and *San Remo Hotel* require that a plaintiff be allowed to start over with a federal takings claim in federal court after the issues have been fully resolved in the state courts. Those decisions require no such wasteful and duplicative litigation. In fact, the result this Court's clear precedent compels is that when a state court has applied its own state's takings laws coextensively with federal law, the result precludes re-litigation *of the same issues* in federal court. *See San Remo Hotel*, 545 U.S. at 338 (noting, in the abstention context, that a claimant cannot negate the preclusive effects of a state court's judgment through a purported reservation of federal claims; such a reservation may be effective only where the

reserved claims are "distinct" from the resolved ones).

• At pages 28-29, Petitioner conflagrates temporary and permanent takings with physical invasion and regulatory takings in order to attempt to make that point that any physical invasion of property, no matter how fleeting or inconsequential, gives rise to a takings claim. Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), Petitioner asserts the truism that permanent physical invasions of property, no matter how small, give rise to a takings claim. However, this portion of Petitioner's claim relates to a *temporary* situation. As noted, the intrusion on the property lasted, essentially, less than a full day and it was completely removed within one week. *See* App. 6. In such cases, in Minnesota and elsewhere, it is the degree of interference with property rights – resulting in a loss of interest in that property – that determines whether the governmental action is a "taking in the constitutional sense." *See, e.g., Spaeth v. City of Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984) (noting that the difference between land intrusion of such frequency, regularity, and permanency, which constitutes a taking, and a mere temporary intrusion, which is left only to possible damages recovery, is "a question of degree"). *See also Vern Reynolds Constr. Inc. v. City of Champlin*, 539 N.W.2d 614, 618 n.2. (Minn. Ct. App. 1985), review denied (Minn. Dec. 20, 1995) (holding that temporary occupation of property by the government does not support

a taking claim, but may sound in tort for nuisance or trespass). At most, temporary intrusions are subject to state law tort remedies that in no way implicate the U.S. Constitution. Petitioner asserts that this has somehow deprived him and other Minnesota citizens of some guaranteed right, but he does not attempt to explain how.

ARGUMENT

In short, Petitioner seemingly concocts a morass in which he asserts he is mired: he could not previously litigate federal claims because they were unripe, and he is now barred by *res judicata* from doing so. But he has had his opportunity, and then some, to have his claims heard. He took a takings claim to trial, did not appeal the result, and Shorewood satisfied the judgment. He cannot, whether in a federal or state forum or on federal or state grounds, continue to relitigate those issues and all other claims he had, related or otherwise, have been likewise decided. Petitioner cannot, by dressing in federal garb the same factual claims already resolved by state courts, continue his fight. *San Remo Hotel*, 545 U.S. 347 (noting that the hotel's claim of having no choice but to proceed in state court first to ripen a federal claim did not free the Court to disregard the requirements of 28 U.S.C. § 1738 in applying preclusion to the state court's decision).

The Minnesota Court of Appeals in this matter conducted a thorough review of the more than sixteen-year history of litigation between these parties. The Court found, following a meticulous review, that Petitioner's many claims had been adjudicated and concluded that he simply was not entitled to continue litigating. In essence, the morass in which Petitioner finds himself mired is self-created. As the Minnesota Court of Appeals stated:

> All issues have been resolved. Although we are not insensitive to appellant's belief that he has not received relief to which he is entitled, we must disagree. Each of appellant's claims has been resolved. He is not satisfied with the resolution, but the claims are nonetheless resolved. . . . It is time that this prolonged litigation and the emotional and financial toll it has taken on all involved – appellant and respondents alike – is declared to be at an end.

App. 41-42. This Court should deny the Petition for Writ of Certiorari and allow those words[1] to be the final ones in this matter.

---

[1] The Minnesota Supreme Court declined to exercise discretionary review in this matter. *See* App. 74-75.

CONCLUSION

Petitioner has provided no salient reason for this Court to accept review of the lower courts' decision in this matter. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE C. HOFF
HOFF, BARRY, & KOZAR, P.A.
775 Prairie Center Drive
Suite 160
Eden Prairie, MN 55344
(952) 941-9220

Attorney for Respondent
City of Shorewood